# TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

**NO. 03-15-00657-CV**

**Chris Traylor, as Executive Commissioner of the Texas Health and Human Services Commission; and the Texas Health and Human Services Commission, Appellants**

**v.**

**Diana D., as next friend of KD, a child; Karen G., as next friend of TG and ZM, children; Guadalupe P., as next friend of LP, a child; Sally L., as next friend of CH, a child; Dena D., as next friend of BD, a child; OCI Acquisition, LLC d/b/a Care Options for Kids; Connectcare Solutions, LLC d/b/a Connectcare Therapy for Kids; Atlas Pediatric Therapy Consultants LLC; and Pathfinder Pediatric Home Care, Inc., Appellees**

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT NO. D-1-GN-15-003263, HONORABLE TIM SULAK, JUDGE PRESIDING**

## M E M O R A N D U M  O P I N I O N

The Texas Health and Human Services Commission and its executive Commissioner Chris Traylor appeal the trial court's orders denying their plea to the jurisdiction and granting a temporary injunction enjoining appellants from implementing certain Medicaid reimbursement rates for home health therapy services. For the reasons that follow, we reverse the trial court's order denying appellants' plea to the jurisdiction and render judgment dismissing the claims asserted against HHSC and the Commissioner for lack of jurisdiction. We also reverse and vacate the temporary injunction.[1]

[1] Also pending before this Court is appellants' rule 24.4 motion to vacate counter-supersedeas order or, in the alternative, increase counter-supersedeas bond. *See* Tex. R.

## STATUTORY AND REGULATORY FRAMEWORK

Medicaid is a cooperative federal-state program that provides health care to needy individuals. *See generally* 42 U.S.C. §§ 1396–1396w (Grants to States for Medical Assistance Programs). Although federal law establishes Medicaid's basic parameters, each state decides the nature and scope of its Medicaid program and submits a State plan describing its program to the federal Center for Medicare and Medicaid Services (CMS), which must approve the plan and any amendments. *See* 42 U.S.C. § 1396a(a), (b); 42 C.F.R. § 430.10. In Texas, HHSC is the agency designated to administer Medicaid. *See* Tex. Hum. Res. Code § 32.021(a); Tex. Gov't Code § 531.021(a).

Relevant to this appeal, section 355.8021 of Title 1 of the Texas Administrative Code provides that home health services provided to eligible Medicaid recipients are reimbursed at the lesser of "the amount billed to Medicaid by the agency" or "the fee established for the specific authorized home health service and published in the Medicaid fee schedules." 1 Tex. Admin. Code § 355.8021(a) (Tex. Health & Human Servs. Comm'n, Reimbursement Methodology for Home Health Servs. and Durable Med. Equip., Prosthetics, Orthotics and Supplies).[2] According to its rules, HHSC's reimbursement rates for home health services are determined based on the following considerations:

> an analysis of the Centers for Medicare and Medicaid Services fees for similar services; Medicaid fees paid by other states; a survey of costs reported by Medicaid home health agencies; the Medicare Low Utilization Payment Adjustment (LUPA)

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App. P. 24.4. We dismiss this motion as moot.

[2] References to sections of the Texas Administrative Code in this opinion are to HHSC rules.

> fees; previous Medicaid payments for Medicaid-reimbursable therapy, nursing, and aide services; or some combination thereof.

*See id.* HHSC also "may conduct periodic rate reviews that will include, but not be limited to, payments for as well as the costs associated with providing these Medicaid-reimbursable therapy, nursing, and aide services." *Id.* § 355.8021(a)(2)(B). Prior to changing rates for these services, HHSC is required to give notice and hold a public hearing. *See* Tex. Hum. Res. Code § 32.0282 (requiring department to provide notice of hearing and "hold a public hearing to allow interested persons to present comments relating to proposed payment rates for medical assistance"). HHSC's rules, however, also authorize it to adjust fees, rates, and charges despite other provisions in chapter 355 in the following circumstances:

> Adjustment of fees, rates, and charges. Notwithstanding any other provision of this chapter, the Commission may adjust fees, rates, and charges paid for medical assistance if: (1) state or federal law is enacted, amended, judicially interpreted, or implemented to: (A) require the Commission to increase or reduce a fee, rate, or charge paid to a provider for medical assistance; . . . or (D) restrict, limit, or condition the availability of appropriated funds to the Commission for payment or reimbursement of medical assistance . . . .

*See id.* § 355.201(d)(1)(A), (D) (Establishment of Adjustment of Reimbursement Rates by HHSC).

Under the regulatory framework, health care managed care organizations (MCOs) are also involved with the provision for Medicaid services. *See* 1 Tex. Admin. Code § 353.1 (Purpose) (stating that purpose of chapter "is to define the requirements for the Medicaid Managed Care program"). Health care providers enter into contracts with MCOs for services that they provide, and MCOs contract with the State. *See id.* § 353.407 (Requirements of Managed Care Plans). MCOs

"must ensure the reasonable availability and accessability of specialists for all covered services requiring specialty care." *See id.* § 353.411(a)(5) (Accessibility of Servs.).

## FACTUAL AND PROCEDURAL BACKGROUND

The underlying dispute concerns HHSC's reductions to Medicaid reimbursement rates to be effective October 1, 2015 ("October rates"). In HHSC's notice of the October rates, HHSC referred to the reductions as "proposed adjustments to Medicaid payment rates for Physical, Occupational, and Speech Therapy provided by Comprehensive Outpatient Rehabilitation Facilities/Outpatient Rehabilitation Facilities (CORF/ORF), Home Health Agencies (HHA), and Independent Therapists." As support for the adjustments, HHSC referred to sections 355.201(d)(1)(A) and (D), 355.8021, 355.8085, and 355.8441. *See* 1 Tex. Admin. Code §§ 355.201(d)(1)(A), (D), .8021, .8085 (Reimbursement Methodology for Physicians and Other Practitioners), .8441 (Reimbursement Methodology for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services). HHSC further referred to the direction from the Texas Legislature in Rider 50, titled "Medicaid Funding Reduction and Cost Containment," to the 2016-2017 General Appropriations Act as the basis for October rates. *See* 2016–17 General Appropriations Act, 84th Leg., R.S., ch. 1281, § 1, art. II, 2015 Tex. Sess. Law. Serv. 4343, 4547–49 ("Rider 50"). HHSC also explained its calculations for the proposed rate adjustments based on data.[3]

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[3] HHSC's notice of the October rates stated:

> Proposed rate adjustments were calculated based on an analysis of Medicaid fees paid by other states and previous Texas Medicaid payments for Medicaid-reimbursable therapy services. Where current Texas Medicaid rates exceed 150 percent of the median of other states' rates for the same service, a percentage reduction is applied.

Appellees are providers of home health therapy services and children who receive those services. Appellees brought suit in August 2015 seeking declaratory and injunctive relief related to prior proposed rate reductions to those services, but HHSC withdrew the prior proposed rates after the suit was filed. HHSC then proposed the October rates, and appellees amended their suit to assert claims based on the October rates. They alleged claims of *ultra vires* actions by the Commissioner, *see City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009); an invalid rule under section 2001.038 of the Government Code, *see* Tex. Gov't Code § 2001.038; and a constitutional due-course-of-law claim under article I, section 19 of the Texas Constitution, *see* Tex. Const. art. I, § 19 (due course of law provision). Appellees also sought a temporary injunction to enjoin HHSC from implementing the October rates pending resolution of their claims.

HHSC and the Commissioner filed pleas to the jurisdiction. In their second amended plea to the jurisdiction, they asserted that appellees had failed to establish a valid waiver of sovereign immunity pursuant to section 2001.038 of the Government Code and chapter 37 of the Uniform Declaratory Judgments Act. *See* Tex. Gov't Code § 2001.038; Tex. Civ. Prac. & Rem. Code §§ 37.001–.011. Both sides submitted briefing on the trial court's jurisdiction to consider appellees' claims, and the trial court held an evidentiary hearing in September 2015 on appellants' second amended plea to the jurisdiction and appellees' request for a temporary injunction. At the hearing, appellees' witnesses included employees of the provider appellees and parents of children receiving home health therapy services. Appellees' witnesses testified about the negative impact that the

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An alternative percentage reduction is applied to Texas Medicaid rates that do not exceed 150 percent of the median of other states' rates for the same service and in cases where information on other states' rate is not available.

October rates would have on the availability of home health therapy services for children. Two employees of appellee Care Options for Kids testified that the October rates would cause Care Options to "close the doors" because the costs of delivering services would exceed the reimbursement rates, no providers would be available for some children, and, even if new providers were eventually found, any interruption of services would be harmful to the children.

Both sides presented evidence at the hearing about the required methodology for setting Medicaid rates under HHSC rules and the applicable standards for HHSC to change Medicaid rates for home health therapy services. Appellees' expert opined that HHSC did not follow or comply with its "rules relating to these types of providers" and testified to deficiencies in HHSC's methods for determining the October rates, including that HHSC failed to conduct a "cost study." Appellees' evidence showed that HHSC did not conduct a survey of the actual costs to the providers of home health therapy services or include the providers' total costs in the data for determining the October rates.

HHSC and the Commissioner countered with evidence to support their positions that Rider 50 mandated that HHSC reduce reimbursement rates and that HHSC had complied with its rules. Their witnesses included HHSC's director of the rate analysis department and its director of strategic decision support. They testified about the data that HHSC considered to determine the October rates, including its previous rates and Medicaid rates in other states for similar services. The director of strategic decision support also testified about the extent to which HHSC considered actual costs to provide the home health therapy services at issue. He testified that the "margin analysis" that HHSC considered analyzed costs "[t]o a degree." That analysis "looks directly at the salary, the

average—the median salary of the provider" and indirect or overhead costs of around 25 percent of direct costs. As to the impact of the October rates on the availability of providers for the children, the director of the rate analysis department testified that HHSC plans to monitor any impact "to ensure that if there is any problem caused by the rate reductions that we would be able to identify those problems quickly and communicate that information to our leadership for them to consider." And she also testified that HHSC intended to submit an amended plan with the October rates to CMS after the injunction hearing, and CMS then would have 90 days to make a decision.

Following the hearing, the trial court denied appellants' plea to the jurisdiction and granted appellees' temporary injunction enjoining appellants from implementing the October rates. The trial court also denied appellants' automatic stay of the injunction pending this appeal. *See* Tex. R. App. P. 24.2. This appeal followed.

## ANALYSIS

HHSC and the Commissioner raise four issues on appeal. They contend: (i) appellees' petition does not establish jurisdiction based on any of the causes of action asserted and that the jurisdictional defects are incurable; (ii) appellees' Texas law claims and remedies related to the amount of Medicaid rates are preempted by the federal Medicaid Act and that Texas law does not create an independent basis for challenging Medicaid rates in state court; (iii) appellees do not have standing to challenge the Medicaid rates or a vested right in a particular level of Medicaid rates; and (iv) appellees do not have a vested property right on which to base a constitutional due-course-of-law claim or the right to inherent judicial review of the October rates. HHSC and the

Commissioner also argue that because there is no potential for recovery, this Court should vacate the temporary injunction.

**Standard of Review**

"A plea to the jurisdiction challenges the court's authority to decide a case." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 149 (Tex. 2012). We review a plea questioning the trial court's subject matter jurisdiction de novo. *See Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We focus first on the plaintiff's petition to determine whether the facts that were pled affirmatively demonstrate that subject matter jurisdiction exists. *Id.* We construe the pleadings liberally in favor of the plaintiff. *Id.* If the plaintiff has not affirmatively pleaded facts to support jurisdiction or to negate jurisdiction, the matter is one of pleading sufficiency, and the court should provide the plaintiff with the opportunity to amend its pleadings to cure jurisdictional defects. *Id.* at 226–27.

If a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court may consider evidence and must do so when necessary to resolve the jurisdictional issues raised. *Id.* at 227; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). When evidence is submitted that implicates the merits of the case, our standard of review generally mirrors the summary judgment standard under Texas Rule of Civil Procedure 166a(c). *Miranda*, 133 S.W.3d at 228; *see also* Tex. R. Civ. P. 166a(c). The burden is on the governmental unit to present evidence to support its plea. *Miranda*, 133 S.W.3d at 228. If the governmental unit meets this burden, the burden shifts to the plaintiff to show that a disputed material fact exists regarding the jurisdictional issue. *Id.* We take as true all evidence that is favorable to the plaintiff and indulge every reasonable

inference and resolve any doubts in the plaintiff's favor. *Id*. If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact question will be resolved by the fact-finder. *Id*. at 227–28. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, however, the trial court rules on the plea to the jurisdiction as a matter of law. *Id*. at 228.

Sovereign immunity from suit deprives a court of subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004); *Miranda*, 133 S.W.3d at 225–26; *see City of Dallas v. Albert*, 354 S.W.3d 368, 374 (Tex. 2011) (stating principle that "waivers of sovereign immunity or consent to sue governmental entities must generally be found in actions of the Legislature"). "It is well recognized under Texas law that there is no right to judicial review of an administrative order unless a statute provides a right or unless the order adversely affects a vested property right or otherwise violates a constitutional right." *Continental Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 397 (Tex. 2000); *see Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011) (considering substance of constitutional claim in reviewing plea to jurisdiction and noting that immunity was retained unless viable claim pleaded).

While sovereign immunity bars actions against the state absent a legislative waiver, *Sykes*, 136 S.W.3d at 638, requests for declaratory relief that do not attempt to control state action do not implicate governmental immunity. *Heinrich*, 284 S.W.3d at 372. Suits against governmental officials alleging that they "acted without legal authority or failed to perform a purely ministerial act" and seeking to compel the officials "to comply with statutory or constitutional provisions" fall within

the "*ultra vires*" exception to governmental immunity because they "do not attempt to exert control over the state—they attempt to reassert the control *of* the state." *Id.*; *see Houston Belt & Terminal Ry. Co. v. City of Houston*, No. 14-0459, 2016 Tex. LEXIS 234, at *20 (Tex. Apr. 1, 2016) (clarifying *ultra vires* standard, citing *Heinrich*, and stating standard "does not create a new vehicle for suits against the state to masquerade as *ultra vires* claims—indeed, our opinion merely reinforces the narrow *ultra vires* principles we have repeatedly announced and endorsed").

To determine whether a party has asserted a valid *ultra vires* claim that invokes the trial court's jurisdiction, we construe the relevant statutory provisions, apply them to the pleaded and unnegated facts, and determine whether those facts constitute acts beyond the official's authority or establish a failure to perform a purely ministerial act. *See Texas Dep't of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 701–02 (Tex App.—Austin 2011, no pet.); *Creedmoor-Maha Water Supply Corp. v. Texas Comm'n on Envtl. Quality*, 307 S.W.3d 505, 516 n.8 (Tex. App.—Austin 2010, no pet.) (quoting *Hendee v. Dewhurst*, 228 S.W.3d 354, 368–69 (Tex. App.—Austin 2007, pet. denied)) (when analyzing whether plaintiff has alleged ultra vires acts, we construe statutes defining official's authority, apply provisions to pleaded and unnegated facts, and determine whether those facts fall within or outside that authority); *see also Houston Belt*, 2016 Tex. LEXIS 234, at *19 (concluding that "governmental immunity only extends to those government officers who are acting consistently with the law, which includes those who act within their granted discretion").

HHSC's issues also require us to construe statutes and rules, matters of law that we review de novo. *See Railroad Comm'n v. Texas Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 624 (Tex. 2011); *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 438

(Tex. 2011) (construing administrative rules in the same manner as statutes). Our primary concern in construing a statute is the express statutory language. *See Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). "We thus construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a construction leads to absurd results." *Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927, 930 (Tex. 2010) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625–26 (Tex. 2008)). We consider the statute as a whole, not isolated provisions. *Texas Citizens*, 336 S.W.3d at 628.

With these rules of construction in mind and the standard of review, we turn to appellants' issues in the context of each of appellees' claims.

**Standing to Assert Due-Course-of-Law Claim**

We begin with appellants' third and fourth issues. As part of their arguments in these issues, HHSC and the Commissioner challenge appellees' standing to assert a Texas constitutional due-course-of-law claim or to seek inherent judicial review based on the October rates. *See* Tex. Const. art. I, § 19; *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77–78 (Tex. 2015) (discussing standing doctrine); *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 850 (Tex. 2000) (noting that standing is component of subject matter jurisdiction); *Continental Cas. Ins. Co.*, 19 S.W.3d at 397 (noting that there is "no right to judicial review of an administrative order unless a statute provides a right or unless the order adversely affects a vested property right or otherwise violates a constitutional right"). Due process concerns arise "when the state or its agents deprive a person of a protected liberty or property interest." *McMaster v. Public Util. Comm'n*, No. 03-11-00571-CV, 2012 Tex. App. LEXIS 7502, at *20 (Tex. App.—Austin Aug. 31, 2012,

no pet.) (mem. op.); *see* Tex. Const. art. I, § 19; *Texas Workers' Comp. Comm'n v. Patient Advocates*, 136 S.W.3d 643, 658 (Tex. 2004) ("Texas's due course of law clause and the federal due process clause are textually different, but we generally construe the due course clause in the same way as its federal counterpart."). To have standing to bring a valid due process claim, a plaintiff must assert "a liberty or property interest that is entitled to constitutional protections." *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 15 (Tex. 2015); *see Concerned Cmty. Involved Dev., Inc. v. City of Hous.*, 209 S.W.3d 666, 671 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("The Due Process Clause is only activated when there is some substantial liberty or property interest which is deserving of procedural protections."). "A constitutionally protected right must be a vested right, which is 'something more than a mere expectancy based upon an anticipated continuance of an existing law.'" *Klumb*, 458 S.W.3d at 15 (citations omitted).

HHSC and the Commissioner argue that the provider appellees do not have a due-course-of-law claim or right to seek inherent judicial review because they lack a vested property interest in a particular level of Medicaid rates. We agree. *See id.*; *see, e.g.*, *Southwest Pharmacy Solutions, Inc. v. Texas Health & Human Servs. Comm'n*, 408 S.W.3d 549, 564–65 (Tex. App.—Austin 2013, pet. denied) (concluding pharmacy company had no justiciable interest and noting that no showing of authority to support proposition that company was entitled to same rate as paid under prior regulatory scheme); *Eldercare Props., Inc. v. Department of Human Servs.*, 63 S.W.3d 551, 556 (Tex. App.—Austin 2001, pet. denied) (concluding that home did not have vested property right to receive additional Medicaid beds and that claim was no more than a "mere expectation 'based on an anticipated continuance of existing law'"); *S.C. San Antonio, Inc. v. Texas*

*Dep't of Human Servs.*, 891 S.W.2d 773, 778 (Tex. App.—Austin 1995, writ denied) (concluding that hospital did not have vested property right to "additional reimbursement").

HHSC and the Commissioner also argue as part of their third and fourth issues that, although the individual appellees may have vested rights in Medicaid participation, they do not have a vested right to a particular level of reimbursement or payment rates to Medicaid providers that would invoke the trial court's jurisdiction. We again agree with appellants. Medicaid benefits are entitled to constitutional protection, but this protection does not mandate that a Medicaid participant has access to a particular provider or that a participant's provider will continue to receive payment or reimbursement rates at a previously set amount. *See* Tex. Gov't Code § 531.0212(b)(2), (6) (providing in Medicaid bill of rights that beneficiaries have "reasonable opportunity to choose a health care plan and primary care provider" and "timely access to care that does not have any communication or physical access barriers"); *Klumb*, 458 S.W.3d at 15; *see, e.g.*, *Blair v. Texas Dep't of Human Servs.*, 837 S.W.2d 670, 671–73 (Tex. App.—Austin 1992, writ denied) (noting that "person has a constitutionally protected interest in a benefit if he has a legitimate claim of entitlement to it" but that "[d]ue process does not require judicial review of an administrative decision" and concluding that "fair hearing" procedures for Medicaid benefits comported with due process); *see also* 1 Tex. Admin. Code §§ 353.407 (describing requirements of managed care plans), .411(a)(5) (requiring MCOs to "ensure the reasonable availability and accessability of specialists for all covered services requiring speciality care").

On these bases, we conclude as a matter of law that appellees do not have standing to assert a constitutional due-course-of-law claim or to seek inherent judicial review of the October

rates. *See Heckman*, 369 S.W.3d at 150–01 (when plaintiff lacks standing to assert claims, court lacks jurisdiction and must dismiss claims); *see also Combs v. City of Webster*, 311 S.W.3d 85, 94 (Tex. App.—Austin 2009, pet. denied) (concluding that "appellees have no vested right in the tax revenues at issue, and therefore, their due course of law and constitutional takings claims fail as a matter of law"); *Miranda*, 133 S.W.3d at 228 (requiring trial court to rule on plea to jurisdiction as matter of law when relevant evidence fails to raise fact question on jurisdiction). Thus, we sustain appellants' third and fourth issues to the extent that they challenge the trial court's jurisdiction to consider appellees' due-course-of-law claim or an inherent right to judicial review of the October rates.

***Ultra Vires* and Rule Challenge**

As part of their first issue, HHSC and the Commissioner argue that appellees have not asserted an *ultra vires* claim as a matter of law and that appellees cannot use the mechanism for challenging formal administrative rules as a collateral vehicle for judicial review when there is none. More specifically, appellants argue that the October rates are not a rule and that the rates were mandated by Rider 50 and properly determined based on section 355.201(d)(1)(A) and (D). *See* 1 Tex. Admin. Code § 355.201(d)(1)(A), (D). If appellees have asserted valid *ultra vires* or rule challenge claims, sovereign immunity does not apply to bar these claims. *See* Tex. Gov't Code § 2001.038(c) (requiring state agency to be party to rule challenge brought under section); *Heinrich*, 284 S.W.3d at 372–73 (describing *ultra vires* claims against governmental officials in their official

capacities as exception to sovereign immunity). We turn then to review appellees' *ultra vires* and rule challenge claims and the relevant evidence as to those claims. *See Miranda*, 133 S.W.3d at 227–28.

***Ultra Vires* claim based on HHSC rules**

Appellees contend that the Commissioner acted *ultra vires* in proposing the October rates because the October rates fail to follow the methodology for determining rates in HHSC rules. Appellees' position is that Rider 50 did not mandate the reductions in the October rates, that the October rates were the result of a "periodic rate review," and that the Commissioner failed to follow HHSC's own rules, including sections 355.8021(a)(2)(B) and 355.201(c)(3), to conduct a "survey of costs" or to consider "costs associated with providing" these types of services or the economic impact of the reductions on the providers. *See* 1 Tex. Admin. Code §§ 355.201(c)(3) (requiring HHSC to establish "fees, rates, and charges to be paid for medical assistance in accordance with," among others, "consideration of economic factors that, in [HHSC]'s determination: (A) have or may have a significant and measurable effect on provider participation; or (B) have or may have a significant and measurable effect on providers' ability to deliver services in accordance with state and federal law"), .8021(a)(2)(B) (authorizing HHSC to conduct "periodic rate reviews that will include, but not be limited to, payments for as well as costs associated with providing . . . services").[4]

[4] Appellees also argue that the October rates violate sections 355.8085, 355.8441, and 353.411(a)(5). *See* 1 Tex. Admin. Code §§ 353.411(a)(5) (Accessibility of Services), 355.8085 (Reimbursement Methodology for Physicians and Other Practitioners), .8441 (Reimbursement Methodology for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Services). Section 353.411(a)(5), however, refers to the requirement that MCOs "ensure the reasonable availability and accessibility of specialists for all covered services requiring speciality care," and the

Appellees argue that, by failing to follow its own rules, the Commissioner arbitrarily set the October rates at a level that will force the providers out of business and eliminate services to the children. The evidence at the hearing showed that HHSC did not conduct a "survey of costs" in determining the October rates and that the reduced rates would have a "significant and measurable effect" on the provider appellees and their ability to deliver services. *See id.* §§ 355.201(c)(3), .8021(a)(2)(A), (B). Appellees also presented evidence to support their positions that other providers would not be available to provide the necessary services to children if the providers went out of business, that the data and reports that HHSC did rely on to determine the October rates were "flawed" and "invalid," and that Rider 50 was based on false information.

Whether the October rates were determined in violation of HHSC rules requires us to interpret the meaning of applicable HHSC rules and Rider 50. We begin with the scope of the directive in Rider 50 from the legislature to HHSC and then turn to HHSC's applicable rules. Rider 50 contains four subsections—(a) through (d). *See* Rider 50. Subsection (a) sets out the specific amount of reductions in appropriations for Medicaid funding and the allocations for the reductions:

> Included in appropriations above in Goal B, Medicaid, is a reduction of $186,500,000 in General Revenue Funds and $249,349,498 in Federal Funds in fiscal year 2016 and $186,500,000 in General Revenue Funds and $247,220,930 in Federal Funds in fiscal year 2017, a biennial total of $373,000,000 in General Revenue Funds and $496,570,428 in Federal Funds. HHSC is authorized to transfer these reductions between fiscal years and to allocate these reductions among health and human services agencies as listed in Article II of this Act, pursuant to the requirement to submit a plan included in subsection (d) of this rider.

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other two sections refer to the methodology in section 355.8021. *See id.* §§ 355.8085(g)(3), .8441(3)(B). Our conclusion that the Commissioner acted consistently with section 355.201(d) applies equally to those sections. *See id.* §§ 355.201(d), .8021(a)(2)(A).

Subsection (b) requires the reductions to be "achieved through implementation of a plan described under subsection (d)" and then lists possible initiatives for achieving the reductions. At the center of the parties' dispute, subsection (c) requires HHSC to reform its reimbursement methodology "while considering stakeholder input and access to care" and specifically states the amount of savings to be achieved through rate reductions and initiatives:

> Out of the amount in subsection (a), in each fiscal year at least $50,000,000 in General Revenue Funds savings should be achieved through rate reductions and $25,000,000 in General Revenue Funds savings may be achieved through various medical policy initiative listed in items (1)-(10), below.

The various medical policy initiatives are then listed. And subsection (d) states in relevant part: "HHSC shall develop a plan to allocate the reductions required by subsection (a) of this rider by taking actions such as those suggested under Subsection (b) and (c) of this rider to the budgets of the health and human services agencies as listed in Chapter 531, Government Code."

Appellees focus on the phrase "those suggested under Subsection (b) and (c) of this rider" that is contained in subsection (d) to support their position that the rider did not require HHSC to reduce reimbursement rates for the home health therapy services at issue. They argue that the use of the word "suggested" supports that the reduction in rates was not mandated. *See Webster's Third New Internat'l Dictionary* 2286 (defining "suggest," among other meanings, as "to put (as an idea, proposition, or impulse) into the mind"). The interplay between the various sections in Rider 50, however, makes clear that the legislature directed HHSC to reduce rates based on a set amount of reduction in appropriations for Medicaid funding. *See Texas Citizens*, 336 S.W.3d at 628 (considering statute as whole).

Subsection (a) of Rider 50 sets a specific amount for savings from rate reductions. The legislature then drew the distinction in subsection (c) between the $50,000,000 of savings from rate reductions—stating the savings "should be achieved through rate reductions"—with $25,000,000 of savings through initiatives—stating the savings "may be achieved through various medical policy initiatives listed in items (1)-(10) below." *See* Tex. Gov't Code § 311.016(1) ("'May' creates discretionary authority or grants permission or a power."), (2) ("'Shall' imposes a duty."); *see also Webster's* at 2104 (defining "should," among other meanings, as "used in auxiliary function to express duty, obligation, necessity, propriety, or expediency"). The use of "should," when juxtaposed against other savings that "may" be achieved through initiatives, indicates that the legislature mandated that $50,000,000 in savings come from rate reductions, while authorizing HHSC to achieve $25,000,000 in savings through "various medical policy initiatives." *See TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 439 ("We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose . . . ."). Subsection (d) further reinforces that the rate reductions stated in subsection (a) are mandatory by referencing the "reductions required by Subsection (a)" when referring to the plan that HHSC is required to develop. *See Webster's* at 1929 (defining "require," among other meanings, as "to ask for authoritatively or imperatively: claim by right and authority"). Viewing the provisions of Rider 50 as a whole, we conclude that the plain language supports HHSC's position that the October rates were mandated by the legislature's direction in the rider. *See Texas Citizens*, 336 S.W.3d at 628; *Scott*, 309 S.W.3d at 930 (construing "text according to its plain and common meaning").

Given this directive from the legislature in Rider 50, we conclude that it was within and consistent with HHSC rules to "adjust" rates to comply with the mandated reduction in appropriations for Medicaid funding. *See* 1 Tex. Admin. Code § 355.201(d) (1)(A) (authorizing rate adjustment when state law requires HHSC "to increase or reduce a fee, rate, or charge paid to a provider for medical assistance"), (D) (authorizing rate adjustment when state law limits "availability of appropriated funds"). In its notice of the October rates, HHSC specifically referred to the rate reductions as "adjustments" and cited section 355.201(d)(1)(A) and (D) as authority for the reductions. *See id.* Section 355.201(d) also expressly authorizes HHSC to "adjust" rates "[n]otwithstanding any other provision of this chapter." Thus, other rules cited by appellees as support for their *ultra vires* claim, such as section 355.8021(a)(2)(B) which addresses "periodic rate reviews," do not apply to the October rates. *Compare* 1 Tex. Admin. Code § 355.8021(a)(2)(B) (addressing "periodic rate reviews" by HHSC), *with id.* § 355.201(d)(1) ("Notwithstanding any other provision of this chapter, the Commission may *adjust* fees, rates, and charges paid for medical assistance if: (1) state or federal law is enacted . . . or implemented to: . . . .") (emphasis added).[5]

Based on the plain language of Rider 50 and section 355.201(d), we conclude that the Commissioner acted consistently with HHSC rules when he determined the October rates in response to the legislative's directive in Rider 50. *See Houston Belt*, 2016 Tex. LEXIS 234, at *19; *TGS-NOPEC Geophysical Co.*, 340 S.W.3d at 438 (construing administrative rules in same manner

[5] In their briefing, appellees contend that HHSC and the Commissioner argue for the first time on appeal that the October rates were "adjustments" so that this argument is not preserved for appellate review. We disagree with this characterization of appellants' position in the trial court. Further, jurisdictional arguments may be raised for the first time on appeal. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95–96 (Tex. 2012).

as statutes); *Scott*, 309 S.W.3d at 930. Thus, we conclude that appellees have not stated a valid *ultra vires* claim against the Commissioner based on the October rates and HHSC rules to invoke the trial court's jurisdiction. *See Houston Belt*, 2016 Tex. LEXIS 234, at *19; *Texas Dep't of Transp.*, 357 S.W.3d at 701–02.

**Rule Challenge**

Similar to their *ultra vires* claim as to HHSC rules, the essence of appellees' rule challenge is that the methodology used by HHSC to calculate the October rates violated its rules. Appellees argue that the October rates constitute an invalid rule and its threatened application interferes with a "legal right or privilege" of appellees. *See* Tex. Gov't Code § 2001.038(a). The crux of appellees' position, however, is that HHSC improperly created a new rule by adopting a new methodology that did not include consideration of costs and that the new rule was invalid because it did not comply with the rulemaking procedures. *See id.* § 2001.003(6) (defining "rule" to be "state agency statement of general applicability"). To support this position, appellees cite *El Paso Hospital District v. Texas Health & Human Services Commission*, 247 S.W.3d 709 (Tex. 2008).

In *El Paso Hospital District*, the Texas Supreme Court concluded that HHSC's "data collection method" was an invalid rule because the agency failed to adopt it as the Government Code requires. *Id*. at 711. HHSC was imposing a cutoff date that was not contained within its applicable rules. *Id*. at 713. But, in contrast to the claims in that case, appellees' claims are based on HHSC rules that do not apply to the October rates, such as the rule relating to "periodic rate reviews." *See, e.g.*, 1 Tex. Admin. Code § 355.8021(a)(2)(B). As stated above, we have concluded that the rule for "periodic rate reviews" does not apply here and that the Commissioner acted consistently with the

applicable rule for rate adjustments. *Compare id.* § 355.201(d) *with id.* § 355.8021(a)(2)(B). Thus, we find the opinion in *El Paso Hospital District* factually distinguishable. *Cf. El Paso Hosp. Dist.*, 247 S.W.3d at 715 (holding that "HHSC should have incorporated the cutoff into the language of the 'base-year rule'"); *see also generally El Paso Cty. Hosp. Dist. v. Texas Health & Human Servs. Comm'n*, 400 S.W.3d 72 (Tex. 2013) (discussing holding and reach of prior opinion).

Appellees do not otherwise identify an HHSC rule that they contend is invalid to invoke the trial court's jurisdiction under section 2001.038. *See* Tex. Gov't Code § 2001.038. Thus, we conclude that appellees have not asserted a valid rule challenge based on the October rates that invokes the trial court's jurisdiction. *See, e.g.*, *Southwest Pharmacy Solutions*, 408 S.W.3d at 564–65 (concluding that appellees did not have "justiciable interest" to assert rule challenge because appellees' losses were result of legislative change to structure of Medicaid program and "not from properly implemented rules effecting those changes").

***Ultra Vires* Claim based on Statutes**

Appellees also argue that even if they do not have an *ultra vires* claim based on HHSC rules, they have a valid *ultra vires* claim because the October rates violate statutory provisions. Appellees contend that the October rates violate section 32.002(a) of the Human Resources Code and sections 531.0212(b)(6), 531.02113, and 533.005(a)(21) of the Government Code because the October rates deny children access to providers and services that are required under Texas law. *See* Tex. Hum. Res. Code §§ 32.002(a) (stating that chapter "shall be liberally construed and applied in relation to applicable federal laws and regulations so that adequate and high quality health care may be available to all children and adults who need the care and are not

financially able to pay for it"); Tex. Gov't Code §§ 531.0212(b)(6) (requiring HHSC to adopt bill of rights that addresses client's right to "timely access to care that does not have any communication or physical access barriers"), .02113 (requiring HHSC to ensure that Medicaid finance system is optimized to maximize receipt of federal funds, "increase and retain providers in the system to maintain an adequate provider network," and "more accurately reflect the costs borne by providers"), 533.005(a)(21) (addressing requirement in contracts between HHSC and MCOs that MCOs demonstrate sufficient provider network).

In the context of the legislature's mandatory directive to HHSC in Rider 50 and our conclusion that the Commissioner acted consistently with HHSC rules in determining the October rates, however, we conclude that the statutes cited and relied on by appellees do not support an allegation of *ultra vires* conduct sufficient to invoke the trial court's jurisdiction. *See Houston Belt*, 2016 Tex. LEXIS 234, at *19. It remains for HHSC to amend the state plan to include the October rates and for CMS to approve the amended plan. *See* 42 U.S.C. § 1396(a), (b); 42 C.F.R. § 430.10.

Premised on their contention that the October rates are an invalid rule, appellees further assert that the rates violate sections 2001.022(a), 2001.023(a), and 2006.002 of the Government Code. *See* Tex. Gov't Code §§ 2001.022(a) (describing local employment impact statements that state agency may be required to do when proposing rule for adoption), .023(a) (addressing notice for proposed rule), 2006.002 (addressing adoption of rules with adverse economic effect).[6] Because we have concluded that the October rates and the methodology used by HHSC to

[6] Appellees do not contend that HHSC failed to comply with the statutory requirements to give notice and hold a hearing on the October rates. *See* Tex. Hum. Res. Code § 32.0282 (requiring department to "hold a public hearing to allow interested persons to present comments relating to

determine the October rates do not constitute a new "rule," it follows that the statutory provisions cited by appellees that address rulemaking under the Government Code do not apply to the October rates and, thus, that those statutes cannot support appellees' *ultra vires* claim. *See* Tex. Gov't Code §§ 2001.022(a), .023(a), 2006.002.

Taking as true all evidence favorable to appellees and indulging every reasonable inference and resolving any doubts in appellees' favor, we conclude that appellees have not asserted a valid *ultra vires* or rule challenge claim as a matter of law. *See Miranda*, 133 S.W.3d at 228. Therefore, we sustain appellants' first issue to the extent that they challenge the trial court's jurisdiction to consider appellees' *ultra vires* and rule challenge claims.

## CONCLUSION

For these reasons, we reverse the trial court's order denying appellants' plea to the jurisdiction and render judgment dismissing the claims asserted against HHSC and the Commissioner for lack of jurisdiction.[7] Because we conclude that the trial court did not have jurisdiction over the claims against HHSC and the Commissioner, we also reverse and vacate the temporary injunction.

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proposed payment rates for medical assistance"); *see also* 1 Tex. Admin. Code § 355.201(e) (Establishment and Adjustment of Reimbursement Rates by HHSC) (addressing required notice of adjustment of fees, rates, and charges). The parties also agree that appellees did not have a right to a contested-case hearing to challenge the October rates. *See* Tex. Hum. Res. Code § 32.0281(e) (authorizing judicial review of action taken by HHSC under section 32.0281, which addresses rules and notice relating to payment rates).

[7] Because we have concluded that the trial court did not have jurisdiction over appellees' claims based on arguments in appellants' first, third, and fourth issues, we do not address other jurisdictional arguments by HHSC and the Commissioner in those issues or their second issue. *See* Tex. R. App. P. 47.1.

Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Field

Reversed and Rendered in Part; Reversed and Vacated in Part

Filed: April 21, 2016